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13 LAUREATE EDUCATION, INC.

14 UNITED STATES DISTRICT COURT  
15  
16 NORTHERN DISTRICT OF CALIFORNIA  
17  
18 SAN JOSE DIVISION

19 LAUREATE EDUCATION, INC.,  
20 a Maryland corporation,

21 Plaintiff,

22 v.

23 TEACHSCAPE, INC., a Delaware corporation

24 Defendant.

Case No.: C 07-3225 RS

**PLAINTIFF LAUREATE  
EDUCATION, INC.'S OBJECTIONS  
TO EVIDENCE PROFFERED BY  
DEFENDANT TEACHSCAPE BY  
REQUEST FOR JUDICIAL NOTICE**

Judge: The Honorable Richard Seeborg  
Ctrm.: 4 (5th floor)  
Date: March 19, 2008  
Time: 9:30 a.m.

1 Pursuant to Federal Rule of Civil Procedure 12(b) and Federal Rule of Evidence  
2 201(e), Plaintiff Laureate Education, Inc. ("Laureate") objects to the introduction of  
3 Exhibit A in the Request for Judicial Notice in Support of Motion to Dismiss First  
4 Amended Complaint ("RJN") by Teachscope, Inc. ("Teachscope"). The Court should reject  
5 Teachscope's improper attempt to bring in evidence on a motion to dismiss that is  
6 completely outside the pleadings.

7 New Rule 12(d) states that:

8 If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are  
9 presented to and not excluded by the court, the motion must be treated as one  
10 for summary judgment under Rule 56. All parties must be given a reasonable  
opportunity to present all the material that is pertinent to the motion.

11 In support of its motion to dismiss for failure to state a claim, Teachscope has offered RJN  
12 Exhibit A, which consists of web sites (with counsel's handwritten notes on them) that are  
13 not referenced in Laureate's First Amended Complaint ("FAC"). Instead, they have been  
14 introduced as evidence to support Teachscope's arguments that the FAC's allegations are  
15 not true or should be discounted. *See* Def.'s Mot. to Dismiss FAC, at 12 n.5. Thus,  
16 Teachscope has filed a motion to dismiss for failure to state a claim, and has sought to  
17 present matters outside of the pleading. Unless the Court excludes this evidence, it must  
18 convert Teachscope's motion to one for summary judgment and allow Laureate discovery to  
19 present evidence in response, pursuant to Rules 12(d) and 56(f).

20 Furthermore, while courts may take judicial notice of indisputable facts outside those  
21 alleged in a pleading in adjudicating a Rule 12(b)(6) motion to dismiss (and Laureate  
22 requests such notice of the Court's own records in another action), the Court should reject  
23 Teachscope's attempt to present the contents of websites as undisputable facts by way of  
24 judicial notice. *See* Fed. R. Evid. 201(b). RJN Exhibit A does not even constitute  
25 admissible evidence, let alone indisputable facts. It consists of third-party web sites that are  
26 hearsay to which no exception applies. *See* Fed. R. Evid. 802. Teachscope's assertion that  
27 these web sites' contents are beyond dispute because they are available to the general public  
28 through their posting on the Internet also should be rejected. Under Teachscope's faulty

logic, the Court could take judicial notice of *anything* outside a complaint that is presented on a motion to dismiss for failure to state a claim, as long as *someone* posted it on a web site. Just because something is posted on the Internet and is publicly available, however, does not mean it is an indisputable fact of which a court should take judicial notice. *See In re Astea Int'l Inc. Sec. Litig.*, No. 06-1467, 2007 WL 2306586, \*8 (E.D. Pa. Aug. 9, 2007) (“While the parties do not dispute the authenticity of the documents and while they may have some relevance to defendants’ case, plaintiffs’ claims are not based on the documents, nor do they expressly rely on or allege the contents of the documents. Additionally, defendants confuse ‘publicly available’ with ‘public record.’ . . . [C]ompany web sites . . . are not ‘matters of public record.’”) (citation omitted). The Court should reject Teachscape’s attempt to use the vehicle of judicial notice as a way make a categorical exception for the contents of web sites to the exclusion of matters outside of the pleading in adjudicating a Rule 12(b)(6) motion to dismiss.

The cases cited in Teachscape’s RJN to admit these web sites are inapposite as none of them deal with the consideration of web sites on a Rule 12(b)(6) motion to dismiss. *See Quan v. Gonzales*, 428 F.3d 883 (9th Cir. 2005) (in reviewing a Board of Immigration Appeals’ decision affirming an immigration judge’s denial of application for asylum, noting that web sites are in accord with the admitted evidence showing that banks in China are open on Sundays); *Helen of Troy, L.P. v. Zotos Corp.*, 235 F.R.D. 634, 639 (W.D. Tx. 2006) (on a motion for summary judgment, taking judicial notice of an undisputed scientific fact “that urea was an acid having a very low pH”, which also was posted on a website); *SemMaterials, L.P. v. Alliance Asphalt, Inc.*, No. 05-320, 2007 WL 269081, at \*1 n.2 (D. Id. Jan. 25, 2007) (in considering application for attorneys fees, taking judicial notice of attorney’s experience posted on web site). Indeed, in none of these cases did a court take judicial notice of facts so as to contradict allegations in a complaint on a Rule 12(b)(6) motion to dismiss, because that would be wholly improper. *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (“all the [factual] allegations in the complaint are true (even if doubtful in fact)”).

1 Dated: February 27, 2008

Respectfully submitted,

2 HELLER EHRMAN LLP

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4 By           /s/ DANIEL N. KASSABIAN          

Attorneys for Plaintiff

5 LAUREATE EDUCATION, INC.